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MAY 23 1984
ALEXANDER L. STEVAS
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NO. 83-6636

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

MICHAEL ANTHONY GUZMAN

Petitioner

V.

THE STATE OF NEW MEXICO

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent State of New Mexico pursuant to Supreme Court Rule 34.2, does not deem a separate statement of the case nor the noted exceptions in the foregoing rule necessary for inclusion in this Brief in Opposition. Petitioner adequately sets out those matters required by Supreme Court Rule 34.1.

SUMMARY OF ARGUMENTS

POINT I

The issue of whether due process is violated by the failure of the jury instruction to provide guidelines or standards that the phrase, "...considering the defendant and the crime..." applies only in mitigation is without merit and should not be reviewed by this Court. This Court has previously addressed the issue. The New Mexico Supreme Court correctly decided the issue. Petitioner's various claims of what the jury might have considered this phrase to mean is speculation without any factual record to support the allegations.

POINT II

The issue of whether the consideration of other cases assertedly outside the published guidelines established by the New Mexico Supreme Court for proportionality review violated due process and right to counsel is without merit and should not be reviewed. Petitioner has not challenged the other cases utilized in proportionality review in the state courts. Proportionality review is not constitutionally required. Nor was defense counsel denied the information necessary to argue proportionality review.

POINT III

The issue of whether constitutional error occurred when one aggravating circumstance was purportedly expanded into two aggravating circumstances is without merit and does not merit review by this Court. The jury found all three "means" of aggravation to be established beyond a reasonable doubt. Thus, whether the "means" constituted two or three aggravating circumstances is irrelevant. Petitioner did not and does not now challenge the evidentiary sufficiency of any of the three "means" of aggravation. The New Mexico Supreme Court correctly decided the legislative intent of the aggravation statute. That interpretation does not raise an issue of constitutional significance.

POINT I

Petitioner asserts a violation of due process to instruct the jury to "consider the defendant and the crime" without any standard or guidelines by which to consider those factors. (Pet., 9-17). He contends that because the jury instruction did not limit "considering the Defendant and the crime" to mitigation only, this omission afforded the jury license to consider those factors in aggravation.

This question does not warrant review by this Court. the issue has been adequately addressed by previous decisions of this Court. Secondly, the New Mexico Supreme Court correctly decided this question. Thirdly, the various assertions that the jury could have considered a variety of non-statutory factors in aggravation rather than mitigation is sheer speculation.

The previous decisions of this Court have made unalterably clear the individualized consideration of "the defendant and the crime" must be considered by the sentencing authority. Zant v. Stephens, __ U.S. ___, 77 L.Ed.2d 235, 251 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio, 438 U.S. 586, 601-5 (1978) (Plurality Opinion). This Court has yet to hold that consideration of "the defendant and the crime" must necessarily be limited to matters of mitigation. Nevertheless, the individualized consideration required of the sentencing authority remains a paramount principle. The issue presented is of no different constitutional import than those previously decided by this Court. There is no need for this Court to review the matter further. Supreme Court Rule, Rule 17.

The New Mexico Supreme Court in deciding the question raised here held that the jury instruction complained of does not allow the consideration of non-statutory aggravating circumstances. The "defendant and the crime" factor relates to the weighing process and not the threshold determination of whether the

charged aggravating circumstance(s) exists. It concluded with the observation that there was no indication that the jury could consider non-statutory aggravating circumstances on the basis of the phrase "...considering the defendant and the crime." (Appendix, A-3). The New Mexico Supreme Court correctly decided this contention and its decision does not require further review by this Court. Supreme Court Rules, Rule 17.

Finally, Petitioner expends much effort in speculating that the jury was free to consider a variety of matters in potential aggravation, some of which would be constitutionally protected behavior. He attached a list at Appendix, page 24 for such material which the jury could have considered based upon the evidence at trial. He points out a variety of other possibilities the jury could have utilized in their sentencing decision. The answer to this aspect of his argument is twofold.

First, the record does not support the slightest suggestion that the jury did consider any such conduct, behavior or material in aggravation in reaching their decision. Petitioner does not make a minimal showing that these variously asserted non-statutory "aggravating" matters were considered by the jury at all. Secondly, his various assertions constitute no more than speculation. Absent a necessary record to establish his contentions, there is nothing this Court can review. The petition for writ of certiorari should be denied. Rule 17, supra.

POINT II

Petitioner's second contention is that he was denied due process and the right to counsel because the New Mexico Supreme Court considered cases outside of its published guidelines in conducting proportionality review. (Pet., 17-21, App., at 5).

To the extent Petitioner complains of the cases utilized by the New Mexico Supreme Court in reviewing his case, he did not challenge the use of such cases in his motion for rehearing. Petitioner alleges at the time the briefs were filed, no cases had yet been reviewed and decided upon which proportionality arguments could be made. This is correct. State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983), cert. denied, 102 S.Ct. 2464 (1983) had just promulgated the proportionality review guidelines a month before Petitioner's Brief-in-Chief was filed. When the decision on petitioner's case was issued, he filed a motion for rehearing. This motion did not challenge any aspects of the proportionality review conducted by the New Mexico Supreme Court. A copy of Petitioner's motion of rehearing is attached hereto as Appendix, 1-4. The order denying the motion for rehearing is found in Petitioner's Appendix at 8. Since this contention was not addressed to the New Mexico Supreme Court by the motion for rehearing, it is not properly before this Court for further review. Petitioner's failure to raise this contention in the New Mexico Supreme Court forecloses the propriety of any review by this Court. Fuller v. Oregon, 417 U.S. 40 (1974).

Secondly, the recent decision of this Court is another ground to deny review. In Pulley v. Harris, __ U.S. ___, 79 L.Ed.2d 29 (1984), this Court held that comparative proportionality review was not constitutionally required in every state court death sentence review. In Pulley, the Court observed:

> Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman. As we have acknowledged in the past, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" (citations omitted) Id., 79 L.Ed.2d at 42.

Assuming that the New Mexico Supreme Court violated its own guidelines by including cases arguably outside the pool of cases permitted for proportionality review, there is no need for this Court to review the alleged error as a matter of constitutional law. Rule 17, supra.

Finally, Petitioner has alleged certain matters which are of dubious accuracy. He asserts that he was denied his rights under the Sixth and Fourteenth Amendments by reason of his attorney being denied information regarding death penalty cases. (Pet., 20). Petitioner's counsel was definitely not denied the information he asserts was necessary to argue the proportionality issue. As noted in State v. Garcia, supra, 99 N.M. at 780, fn.11, 664 P.2d at 978, the New Mexico Supreme Court imposed upon defendant's attorney the responsibility to supply that court with the information necessary on similar cases. The court noted such information was a matter of public record. The Petitioner was only denied such information to the extent that his request that the New Mexico Supreme Court direct the Attorney General's office to comply such information for him was denied. (Pet. App., 19-22).

In any event, Petitioner makes no allegation or showing in this Court that the cases utilized by the New Mexico Supreme Court in its proportionality analysis were detrimental to his rights. He cites two New Mexico decision which are alleged are inappropriate for such consideration. (Pet. 19-20). He contends that these cases included different aggravating circumstances

than his own. This is incorrect. The two cases each involved the identical but fewer aggravating circumstances than the jury found in the instant case. State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983) and State v. Simonson, __ N.M. ___, 669 P.2d 1092 (1983). Petitioner makes no argument, showing or otherwise that consideration of these cases operated to his prejudice on the proportionality issue. Absent such a showing, there is no factual basis upon which this Court could review the issue. Such a circumstance militates against review by this Court. Rule 17, supra.

POINT III

Petitioner finally argues that it is a violation of due process if one aggravating factor with alternative provisions is expanded into two separate aggravating factors. (Pet., 21-25). Petitioner argues that where one aggravating circumstance which can be committed in the course of two different felonies is separated into two separate aggravating circumstances, this somehow results in a violation of due process. Petitioner does not challenge the sufficiency of the evidence as to either alternative aggravating factor. He does not demonstrate how this procedures denied him due process.

Petitioner's initial argument is that if each of the aggravating felonies, criminal sexual penetration and kidnapping, were intended to be separate aggravating circumstances, each would have been listed has a separately lettered aggravating circumstance. (Pet., 21). How this conclusion is reached is not clear by the petition.

The second argument proceeds on the basis that the likelihood of the jury being more influenced by three aggravating circumstances instead of two was enhanced by the format of the actual instructions given to the jury. (Pet, 23-24, App., 17, 25). This curious argument contends that the actual typing of the mitigation instruction was "less distinguished" in format than the individual aggravation factors.

To the extent Petitioner was dissatisfied with the typed format of the respective aggravation and mitigation instructions, this issue has not been preserved for review in this Court. It was not raised in the trial court in the first instance. If petitioner wanted the mitigation instruction to be as "distinguished" as the aggravation instructions, he should have requested identical formats for both forms of instructions. Having failed to raise this claim in the trial court, the matter should

not be reviewed in this Court. Fuller v. Oregon, supra. The Petitioner did address this argument to the New Mexico Supreme Court which ignored it.

Petitioner combines the two foregoing contentions and speculates without a suggestion of support from the record that it is reasonable to assume that many jurors gave greater weight to the mere number of aggravating factors and considered them to be more significant than only two in the balancing process. (Pet., 23). Petitioner does not demonstrate how this deprived him of due process nor give this Court a hint as to the manner in which he suffered any prejudice, assuming error of any dimension occurred.

Petitioner does not argue that the evidence was insufficient as to either of the alternatives or the separate aggravating circumstances. As an issue of constitutional dimension, there is nothing for this Court to review. Such a conclusion is compelled by the jury findings on the aggravating circumstances. The jury unanimously found beyond a reasonable doubt Petitioner murdered a witness, the murder occurred during the crime of criminal sexual penetration and it occurred during kidnapping. (R.P., 393, 394 & 395; Pet. App. A-8.5).

In view of the jury findings, it is a reasonable inference that the jury would have imposed the same sentence, irrespective of the manner in which the three aggravating means of murder were presented to them. This claim does not merit review by this Court. Rule 17, supra.

Finally, the New Mexico Supreme Court correctly decided this issue adversely to Petitioner's position. The court assumed that when the legislature used the conjunction "or", it intended that either of the crimes could be used as an aggravating circumstance. The fact that both criminal sexual penetration and

kidnapping were contained in one subsection of the statutes is immaterial. (Pet. App., 3-4).

To the extent that the New Mexico Supreme Court relied on Zant v. Stephens, supra, that reliance is of no consequence in this case. For even if one of the aggravating circumstances were found to be invalid, it would not be invalid on an evidentiary basis but only on a numerical basis. The separate aggravating circumstances of murder in the commission of criminal sexual penetration and murder in the commission of a kidnapping are not sought to be reviewed on the basis that the evidence does not support one or the other.

Any invalidation could only be based upon "numerical" invalidity; that is, murder in the course of criminal sexual penetration and kidnapping should have been one aggravating circumstance by two different means. Since the jury found all three means to be established beyond a reasonable doubt, all means of the aggravating circumstances remain unchallenged on substantive grounds. Petitioner merely challenges the format of the aggravation as presented. This does not present a question of constitution dimension. The petition should be denied. Rule 17, supra.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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January 25, 1984

The Honorable Judge William R. Federici
New Mexico State Supreme Court
P. O. Box 848
Supreme Court Building
Santa Fe, New Mexico 87501

RE: State v. Guzman - No. 14,450

Dear Judge Federici:

Pursuant to our conversation on January 23rd in which you orally approved the enclosed Motion, I am enclosing the written Motion as well as the Motion for Rehearing. The original Motions have been filed with the Court Clerk.

Thank you for your consideration on this matter.

Very truly yours,

JOSEPH M. FINE

JMF/adj

Enclosures

cc: Attorney General

RECEIVED
JAN
ATTORNEY GENERAL

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

-versus- No. 14,450

MICHAEL ANTHONY GUZMAN,

Defendant-Appellant.

MOTION FOR EXTENSION OF TIME

Comes now MICHAEL ANTHONY GUZMAN, by and through his attorney of record, Joseph M. Fine, and respectfully requests that the Court extend the time for filing a Motion for Rehearing from January 23rd until January 25th.

As grounds for this Motion, Movant states that Joseph M. Fine was visiting his family in Florida until January 20th, 1983, did not see the decision until January 22nd and was ill upon returning to Albuquerque.

Respecfully submitted,

JOSEPH M. FINE
Attorney for Defendant-Appellant
812 Marquette, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-4541

I hereby certify that a true copy of the foregoing was sent to opposing counsel of record this 7th day of January, 1984.

BY: JOSEPH M. FINE

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

-versus- No. 14,450

MICHAEL ANTHONY GUZMAN,

Defendant-Appellant.

MOTION FOR REHEARING

Comes now MICHAEL ANTHONY GUZMAN, by and through his attorney of record, Joseph M. Fine, and moves the Court for a rehearing with respect to the above captioned case.

As grounds for this Motion, Movant states that he believes the Court has overlooked or misapprehended the following points of law or fact:

1. UJI Crim. 39.33 allows the jury to consider non-statutory aggravating circumstances although these circumstances are not specifically described as aggravating circumstances (See Brief-In-Chief at pp. 1-12);

2. Subsection 31-20A-5(B) was not intended by the New Mexico Legislature to permit more than one separate

aggravating factor (See Brief-In-Chief at pp. 17-22);

3. The Court is required to review whether the evidence supports a finding that the mitigating outweigh the aggravating circumstances and not whether the evidence supports the jury's determination of the death penalty, and the evidence does in fact support a finding that the mitigating outweigh the aggravating circumstances (See Brief-In-Chief at pp. ix-xxxviii and 25-28).

Respectfully submitted,

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Telephone: (505) 243-4541

I hereby certify that a true copy of the foregoing was sent to opposing counsel of record this 24th day of January, 1984.

BY: _____
JOSEPH M. FINE

END OF DOCKET